No. 95-1056

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRIAN K. COPELAND,

Petitioner,

—v.—

MBNA AMERICA, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

RESPONDENT'S MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The sole question for review is the third question listed in the petition, which respondent believes should be restated as follows:

> Whether the term "interest" in Section 30 of the National Bank Act, 12 U.S.C. § 85, includes late payment fees charged by a national bank on credit card accounts?

RULE 29.6 LISTING

Respondent MBNA America Bank, N.A., states that it is a wholly-owned subsidiary of MBNA Corporation.

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RESPONDENT'S MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent agrees with petitioner that this Court should grant a writ of certiorari to resolve a direct conflict between the decisions of the highest courts of three states on the issue of whether the term "interest" in Section 30 of the National Bank Act, 12 U.S.C. § 85 ("Section 85"), includes late payment fees. The Colorado Supreme Court in this case and the California Supreme Court in *Smiley* v. *Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 153, 900 P.2d 690, 700, 44 Cal. Rptr. 2d 441, 451 (1995), *petition for cert. pending*, No. 95-860 (U.S. filed Nov. 30, 1995), both held that Section 85 includes late payment fees as "interest." A recent decision of

the New Jersey Supreme Court in *Sherman* v. *Citibank (South Dakota), N.A.*, No. A-102-94 (N.J. Nov. 28, 1995), *petition for cert. pending*, No. 95-991 (U.S. filed Dec. 21, 1995)(Pet. App. 51-124), held that it does not.

If late payment fees constitute "interest" for purposes of Section 85, they are not subject to state regulation, permitting national banks to conduct their interstate lending activities on a consistent basis throughout the nation.

A. Background

MBNA America Bank, N.A. ("MBNA"), is a national bank chartered by the Office of the Comptroller of the Currency ("OCC") and located in Delaware. MBNA issues Visa and MasterCard credit cards and extends credit to customers throughout the country. MBNA's cardmember agreements expressly state that MBNA may charge a late payment fee when cardholders fail to pay a specified amount of their outstanding balances by the payment due date.

On June 5, 1992, petitioner commenced an action, on behalf of himself and all Colorado holders of MBNA credit cards, in the Colorado District Court, County of Denver, alleging that he has a credit card issued by MBNA, that he had been assessed a late payment fee, and that such fees are impermissible under Colorado law. (Pet. App. 29-50.) On July 13, 1992, MBNA removed that action to the United States District Court for the District of Colorado, and on May 7, 1993, the district court granted petitioner's motion to remand on the ground that it lacked federal question or diversity jurisdiction over plaintiff's claims. *Copeland* v. *MBNA Am. N.A.*, 820 F. Supp. 537 (D. Colo. 1993).

B. How the Federal Question Was Presented and Resolved Below

Shortly after remand, MBNA moved for judgment on the pleadings on the ground that Section 85 preempts the state laws underlying plaintiff's claims. MBNA argued that Section 85 authorizes national banks to impose late payment fees as part of their loan charges when such fees are authorized by the laws of the bank's home state. Delaware law permits banks located there to charge late payment fees in connection with credit card lending. *See* Del. Code Ann. tit. 5, § 950. On July 9, 1993, the Colorado trial court granted MBNA's motion and dismissed the complaint in its entirety. (Pet. App. 27-28.)

On May 24, 1994, the Colorado Court of Appeals affirmed that dismissal. (Pet. App. 21-26.) The court of appeals specifically held that, since the term "interest" in Section 85 encompasses late charges, Section 85 preempts Colorado laws purporting to prohibit those charges. After the court of appeals denied his motion for reconsideration, petitioner sought and, on October 24, 1994, was granted review by the Colorado Supreme Court. (Pet. App. 18-20.)

The Colorado Supreme Court affirmed the court of appeals' decision, holding that "as a matter of federal law," MBNA's late payment charge "is a form of 'interest' under section 85 of the [National Bank Act]. Because MBNA is a national bank located in Delaware, and Delaware law permits the imposition of a late payment fee," MBNA may charge those fees to Colorado residents "despite the fact that Colorado prohibited such fees." (Pet. App. 6-7). The court entered its judgment on November 20, 1995.

ARGUMENT

I.

THE ISSUE OF WHETHER THE TERM "INTEREST" IN SECTION 85 INCLUDES CREDIT CARD LATE PAYMENT FEES WARRANTS REVIEW.

A. The Decision of the Colorado Supreme Court Conflicts with a Decision of the New Jersey Supreme Court.

The exercise of jurisdiction is warranted here because there is a conflict between the courts of last resort in Colorado and California and the court of last resort in New Jersey on the issue of whether the term "interest" in Section 85 covers credit card late payment fees. *See* Sup. Ct. Rule 10.

On November 28, 1995, the Supreme Court of New Jersey issued a decision in *Sherman* v. *Citibank (South Dakota), N.A.*, No. A-102-94 (N.J. Nov. 28, 1995), holding that "late-payment fees are not 'interest' within the intendment and purposes of [the National Bank Act]." (Pet. App. 54.) Not only does that holding directly conflict with the decision of the Colorado Supreme Court, but it also conflicts with a decision of the California Supreme Court in *Smiley* v. *Citibank (South Dakota), N.A.*, 11 Cal. 4th 138, 153, 900 P.2d 690, 700, 44 Cal. Rptr. 2d 441, 451 (1995) (holding that the term "interest" in Section 85 governs late payment fees), and of the Third Circuit in *Spellman* v. *Meridian Bank*, No. 94-3203, 1995 WL 764548, at *14-*18 (3d Cir. Dec. 29, 1995) (holding that late fees constitute "interest" under Section 85).

The New Jersey Supreme Court's decision also conflicts by inference with a decision of the First Circuit in *Greenwood Trust Co.* v. *Massachusetts*, 971 F.2d 818 (1st Cir. 1992), *cert. denied*, 113 S. Ct. 974 (1993) (holding that the term "interest" in a statute modeled after Section 85 includes credit card late payment fees), and with the long-standing interpretation of Section 85 by the Office of the Comptroller of the Currency ("OCC"), the federal banking agency charged with the responsibility for enforcing the National Bank Act and supervising the banking activities of national banks.[1]

A decision by this Court on the federal question presented here is also necessary to provide guidance to the multitude of lower courts in which the identical issue is pending. The issue of whether Section 85 governs credit card late payment and other credit card fees currently is presented for decision (or recently has been decided) in the courts of the States of California, Colorado, Pennsylvania, New Jersey and Wisconsin and in federal courts in Minnesota, Alabama and Pennsylvania.[2] In all of these actions, plaintiffs have argued

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[1] *See, e.g., Independent Bankers Ass'n of Am.* v. *Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *First Nat'l Bank* v. *Smith*, 610 F.2d 1258, 1264 (5th Cir. 1980).

[2] The identical issue presented here is pending in the following cases: *Mazaika* v. *Bank One Columbus, N.A.*, 653 A.2d 640 (Pa. Super. 1994), *allocator granted*, 659 A.2d 557 (Pa. May 25, 1995); *Gadon* v. *Chase Manhattan Bank*, 653 A.2d 697 (Pa. Super. 1995) (appeal pending); *In re Citibank (South Dakota), N.A. Credit Card Litig.*, 653 A.2d 39 (Pa. Super. 1995), *allocator granted*, 659 A.2d 984 (Pa. May 31, 1995). In addition to the recent decisions in *Copeland*, *Smiley*, *Sherman* and *Spellman*, the issue also was presented in the following cases: *Richardson* v. *Citibank (South Dakota), N.A.*, No. 94SC670, 1995 WL 748059 (Colo. Dec. 18, 1995); *Stoorman* v. *Greenwood Trust Co.*, No. 94SC382, 1995 WL 748061 (Colo.

(continued...)

that Section 85 (or statutes modeled after Section 85) does not govern credit card late payment and other fees, that, in charging such fees, national banks have violated various provisions of state law, and that plaintiffs are entitled to millions of dollars in damages.

B. The Question Presented Is of Critical Importance to the Feasibility of Interstate Credit Card Programs.

The National Bank Act was enacted by the Civil War Congress in 1864 for the purposes of establishing a strong national banking system and fostering interstate lending. *Marquette Nat'l Bank* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 314-15 (1978). Section 85 authorizes a national bank to charge interest at the rate allowed by the law of the state where the bank is located. To effectuate Congress's objective in enacting the National Bank Act, courts over the years have interpreted Section 85 broadly to govern a wide array of loan-related charges. *See, e.g., Citizens' Nat'l Bank* v. *Donnell*, 195 U.S. 369, 373-74 (1904); *Northway Lanes* v. *Hackley*

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[2](...continued)
Dec. 18, 1995); *Harris* v. *Chase Manhattan Bank, N.A.*, 34 Cal. App. 4th 1563, 35 Cal. Rptr. 2d 733 (1994), *review granted*, 889 P.2d 540, 38 Cal. Rptr. 2d 346 (Cal. 1995), *review dismissed*, 905 P.2d 417 (Cal. 1995), *petition for cert. pending*, No. 95-951 (U.S. filed Dec. 18, 1995); *Hunter* v. *Greenwood Trust Co.*, No. A-103-94, 1995 WL 710417 (N.J. Nov. 28, 1995), *petition for cert. pending*, No. 95-963 (U.S. filed Dec. 18, 1995); *Tikkanen* v. *Citibank (South Dakota), N.A.*, 801 F. Supp. 270 (D. Minn. 1992); *Wisconsin* v. *Ameritech Corp.*, No. 92 CV 1013 (Wis. Cir. Ct. July 14, 1993); *Syx* v. *Greenwood Trust Co.*, CV 91-8824 MC (Ala. Cir. Ct. 10th Cir. May 2, 1994). *See also Hill* v. *Chemical Bank*, 799 F. Supp. 948 (D. Minn. 1992); *Nelson* v. *Citibank (South Dakota) N.A.*, 794 F. Supp. 312 (D. Minn. 1992).

Union Nat'l Bank & Trust Co., 464 F.2d 855, 861-64 (6th Cir. 1972).

Similarly, the OCC over several decades has interpreted Section 85 to include a diverse group of charges, including credit card late fees. *See, e.g.*, Office of the Comptroller of Currency, Interpretive Letter No. 670, Julie L. Williams, Chief Counsel, *reprinted in* [1994-1995 Transfer Binder] Fed. Banking L. Rep. ¶ 83,618, at 71,832, 1995 WL 416305 (Feb. 17, 1995). On March 3, 1995, the OCC proposed a formal rule confirming its long-standing view that Section 85 includes a variety of loan-related charges assessed in connection with lending or the extension of credit. *See* 60 Fed. Reg. 11924-11941 (1995) (to be codified at 12 C.F.R. § 7.4001). The OCC also participated as *amicus curiae* in the Colorado Supreme Court, urging that court to interpret the term "interest" in Section 85 broadly to include credit card late fees.[3]

National banks have relied on that regime of judicial and regulatory authority in establishing their lending programs, including their credit card lending programs. According to recent industry data, banks have lent billions of dollars in connection with their interstate credit card programs. Faulker & Gray, Inc. Credit Card News, *Why Card Issuers' Average Balances Were Flat at Year-End 1994* (Oct. 15, 1995). These interstate lending programs require uniformity and predictability of governing law. The conflict between the recent decisions of the California, Colorado and New Jersey

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[3] This Court has held that the OCC's reasonable construction of the National Bank Act should be accorded deference. *See, e.g., NationsBank of N.C., N.A.* v. *Variable Annuity Sec. Indus. Ass'n*, 115 S. Ct. 810 (1995); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987).

Supreme Courts undermines the uniformity and predictability necessary to the continued vitality of these programs.[4]

Not only do the banks need to know what law they must look to in establishing their programs, but consumers, regulators and state legislatures need to know the laws governing these matters. For instance, while this case was pending in the Colorado courts, the Colorado legislature passed a law permitting banks located in Colorado to charge late payment fees, on the legislature's understanding that under Section 85 and other related federal banking statutes Colorado banks could charge those fees to all customers regardless of where they reside. *See* Colo. Laws 1993, S.B. 93-170, § 2 (eff. Apr. 26, 1993) (codified at Colo. Rev. Stat. § 5-3-203(6)). Also relying on extant regulatory and judicial interpretations of Section 85 and related federal banking statutes, other state legislatures have recently amended their laws. *See, e.g.*, Cal. Fin. Code §§ 4000-4001 (Deering Supp. 1995); N.J.S.A. 17:16C-42(a). Thus, resolution of the issue presented here will provide all affected parties with guidance as to the applicable regulatory regime.

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[4] Twenty-six states have laws that prohibit or restrict late charges. DRI/McGraw Hill, *A Study of Employment, Regulations and the Credit Card Industry*, at Table 3, pp. 16-17 (Feb. 1993). If, as the New Jersey Supreme Court held, all non-periodic percentage credit card fees charged by national banks are governed by the law of the borrower's state, rather than by Section 85 of the National Bank Act, banks would be deprived of uniformity and predictability with regard to credit card accounts in any of those twenty-six states.

II.

THE OTHER TWO QUESTIONS PRESENTED IN THE PETITION DO NOT WARRANT REVIEW.

Petitioner raises two questions in the Petition which do not merit review by this Court. The questions of whether Congress intended "Delaware's legislative definition of 'interest' to define the federal term 'interest'" in Section 85 (question 1 in the petition) and whether Congress may "constitutionally delegate to Delaware the power to define the federal lending term 'interest'" (question 2 in the petition) are not certworthy issues because the Colorado Supreme Court did not hold that Congress intended Delaware to define the term "interest" or that Congress has the constitutional authority to do so. To the contrary, the Colorado Supreme Court held only that "interest" "as a matter of federal law" includes late payment fees. (Pet. App. 6.)

The court, in clear terms, framed the question that it was deciding, to wit: "if late payment fees are a form of 'interest' under section 85 of the [National Bank Act]." (*Id.* at 8.) In resolving that question it looked first to the statute, concluding that Section 85 "does not provide a definition for the term 'interest' or 'interest at the rate'" (*id.* at 9), and then to the legislative history of the statute, concluding that it "does not directly address whether late payment fees are a form of 'interest'" (*id.* at 11). After a review of decisions of this Court and lower federal and state courts, the court stated that "it is apparent that a national bank can charge a variety of banking fees, as forms of 'interest,' to credit cardholders in other states if allowed by the national bank's home state." (*Id.* at 12.) In addition to finding "sufficient [judicial] authority to allow [it] to conclude that a form of late payment fees was included in the definition of the term 'interest' at the time the

[National Bank Act] was enacted," the court accorded deference to "OCC administrative opinions and rulings" interpreting Section 85 to govern late payment fees. (*Id.* at 13.) It then concluded "that the NBA's purpose and legislative history compel a finding that late payment fees are a form of 'interest' under section 85 of the National Bank Act." (*Id.* at 17.) The court's analysis and conclusion demonstrate conclusively that it decided only the issue of whether "interest" in Section 85 includes late payment fees.

The statement in footnote 4 of the decision does not, contrary to petitioner's contention, demonstrate that the court decided that Congress intended for Delaware's legislative definition of "interest rate" to displace Colorado's statutory and common law prohibiting late fees on revolving credit accounts. Indeed, to the extent the court even considered the issue of whether federal or Delaware law displaces Colorado law, its decision was that Congress did not so intend:

> The NBA directs that a nationally chartered bank may charge interest on loans as permitted by the bank's home state. The incorporation here of Delaware law has an incidental effect on enforcement of a provision of the Colorado UCCC when a Colorado resident . . . chooses to obtain a loan from MBNA. That fact, however, does not amount to a showing of preemptive effect. Congress has limited its regulation in the NBA to nationally chartered banks and has made no attempt either to interfere with Colorado's regulation of state chartered banks or to occupy the field of consumer loans.

(*Id.* at 6 n.4.) The language of the court on the issue of whether "interest" is defined by reference to federal law or Delaware law could not be clearer: "We conclude that, as a matter of federal law," MBNA's late charge "is a form of

'interest' under Section 85 of the [National Bank Act]." (*Id.* at 6.)

Nor is there any merit to petitioner's contention that certiorari should be granted on the issue of Congress's constitutional authority to delegate to Delaware the power to define the term "interest" in Section 85 since the court did not decide that Congress has such constitutional authority.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted as to question 3 of the petition as restated by respondent in this memorandum.

Respectfully submitted,

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